BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

I.

The Index precedes the petition for rehearing.

II.

No Report of an Opinion Below.

There is no reported opinion on the merits of either the Supreme Court of Texas, the Court of Civil Appeals of Texas, or the District Court of Texas.

The final order of the District Court of Texas appears at R. 22 and 23.

The Order of the United States District Court, as a court of bankruptcy, upon which the final order of the District Court of Texas is based is at R. 58 to 60.

III.

The Grounds Upon Which the Jurisdiction of This Court Is Invoked.

The grounds set forth to sustain the jurisdiction of this court are set forth in the preceding supplement to the petition for certiorari at pages 7 to 14 under headings "The Basis of the Jurisdiction of This Court," "The Questions Presented," and "Reasons Relied Upon for Allowance of a Writ of Certiorari."

IV.

Concise Statement of the Case.

On July 26, 1939, the petitioners filed their farmer debtor petition under Section 75 (a) to (r) in the District Court of the United States for the Northern District of Texas. Caption: R. 67. File Mark: R. 78.

On December 6, 1939, the District Court entered an unlawful order abandoning and disclaiming the 2560 acres involved here and authorizing the respondent to foreclose his mortgage deed of trust. R. 58. File mark: R. 61. This order was unlawful: *Union* v. *Byerly*, 1940, 310 U. S. 1; *Kalb* v. *Feuerstein*, 1939, 308 U. S. 433; *John Hancock* v. *Bartels*, 1939, 308 U. S. 180.

This order was by statute not effective until December 16, 1939, Rules of Civil Procedure, Rule 62 (a), 28 U. S. C. 874 and 880.

The respondent's mortgage deed of trust requires that before foreclosure the land be first advertised for sale for a period of **Twenty-one days** ("at least twenty days successively next before the day of sale, **exclusive of the day of posting and the day of sale**"). R. 51.

The advertisement was begun on the day the order was entered and ten days before the order was effective, that is on December 6, 1939. Date of the advertisement: R. 57 at bottom of page. The advertisement between December 6 to December 16, 1939, was thus unlawful.

The period of the required twenty-one days advertisement from the effective date of the order of December 16, 1939, expired on January 6, 1940. The foreclosure sale was completed and the deed was executed on January 2,

1940. R. 54 to 56. Date of deed: R. 56, top of page. This deed to the purchaser in foreclosure was made **four days** before a deed could lawfully be made. It is therefore a nullity.

The judgment of the state District Court obtained on May 24, 1941, by the respondent to validate his void deed in foreclosure which he presumed to take under the unlawful order of the United States District Court is therefore a nullity. R. 22 to 24.

This judgment of the state District Court did not become final until the litigation concerning it had passed into the final judgment of the Supreme Court of Texas when a motion for rehearing was overruled on May 20, 1942. R. 104.

The time for filing the petition for certiorari herein was extended to September 19, 1942 and it was filed on that date. R. 104.

V.

Specification of Errors.

1.

The state courts erred in recognizing as valid the order of the state District Court which purported to validate the foreclosure procedure followed by the respondent and to clear the title of the respondent under his mortgage deed of trust.

2.

The state courts erred in treating as valid the presumed authority in the respondent to institute and maintain foreclosure of his mortgage deed of trust.

3.

The purported authority obtained by the respondent under which he presumed to foreclose his mortgage deed of trust was void.

4.

The procedure employed by the respondent through his trustee to foreclosure his mortgage deed of trust was invalid and void.

VI.

Summary of the Argument.

The order of the United States District Court, dated December 4, 1939, and entered December 6, 1939, purporting to abandon and disclaim from the farmer debtor proceeding for composition or extension under Section 75 (a) to (r) 2560 acres of the property scheduled by the farmer debtors, was unlawful and void. The respondent has no right to rest upon such an unlawful order which he himself obtained in an unlawful manner.

Even if the order of December 6, 1939, from the United States District Court had been a valid order it could not become effective until ten days thereafter, that is on December 16, 1939. The mortgage deed of trust under which the respondent claims his title by foreclosure requires twenty-one full days of notice by advertisement before sale in foreclosure can be held. Unlawful advertisement can not support a foreclosure sale. The respondent took his present title by a void deed which was made and recorded before the time required to complete foreclosure had expired.

Such void deed could not convey any title to the respondent by any judgment of the District Court of Texas. Such judgment must be held to be void. That judgment did not become final for any purpose until the appeal from it was finally terminated by the Supreme Court of Texas. It is that judgment which is presented to this court for review by certiorari.

VII.

ARGUMENT.

That the order of the District Court of the United States of December 6, 1939, which presumed to abandon and disclaim the property of the farmer debtors and to authorize the mortgagee to foreclose, is unlawful has been indisputably determined by this court. *Union* v. *Byerly*, 1940, 310 U. S. 1. *Kalb* v. *Feuerstein*, 1939, 308 U. S. 433. *John Hancock* v. *Bartels*, 1938, 308 U. S. 180.

This order of the United States District Court was not only **unlawful**, it was also **void**. A reading of that order at R. 58 shows that the procedure prescribed in Section 75 (o) was ignored. That procedure requires:

1. A petition to the judge;
2. Reference of the petition to the conciliation commissioner;
3. Hearing by the conciliation commissioner;
4. Report by the conciliation commissioner;
5. An order by the judge.

The facts in this case are not those in the *Byerly* case where this court by a divided opinion held that, although a similar order was unlawful, yet it was not void because the **state court** in conducting foreclosure proceedings had a right to presume that the bankruptcy court knew how to conduct its procedure. In the *Byerly* case the state court finally acted by completing foreclosure when the farmer debtor case stood **dismissed**. Here the farmer

debtor case was at **all times pending.** Here it was **not the state court** which conducted the foreclosure, but **the mortgage holder himself** through his trustee under a power of sale without the intervention of any court proceeding. **He, the mortgage holder himself,** obtained the unlawful United States District Court order and then **he himself** proceeded under that unlawful order. **He himself** had no right to presume that **his own wrong** was right—that **his own** unlawful procedure was lawful.

Section 75 (n), (o), and (p), are very clear and peremptory:

> Section 75(n): "The filing of a petition . . . shall immediately subject the farmer and **all his property** wherever located, for all the purposes of this section, to the **exclusive jurisdiction of the court.**
>
> Section 75 (o): "Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings **shall not be instituted** . . . in any court **or otherwise** against the farmer or his property . . . Proceedings for foreclosure of a mortgage on land . . ."
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> Section 75 (p): "The prohibitions of subsection (o) . . . **shall apply** to all creditors, public or private, and to all the debtors' property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors as provided for in Section 75 of this Act."

No words could be plainer or more peremptory.

The respondent can not build his title upon his own wrong and upon the unlawful act of the bankruptcy court which he importuned that court to commit.

At all times involved in this issue the farmer debtor proceeding in the bankruptcy court was under Section 75

(a) to (r) for composition or extension. It never progressed into Section 75 (s). There was no adjudication. Nearly a year thereafter, on November 11, 1940, it was still pending under Section 75 (a) to (r) for composition or extension. See R. 79 to 80.

Article VI of the Constitution makes the Section 75 which was passed in pursuance of the Constitution the Supreme Law of the Land and requires every judge of every state and federal court to observe it and to swear that he will observe it. The order of the United States District Court violates this provision of the Constitution. No judgment of a state court may validate the unlawful order of the United States District Court.

But even if the argument of the mortgage holder should prevail that (1) the order of the United States District Court was lawful, or (2) if unlawful it was no void, because he who sought that unlawful order could make it lawful by proceeding under it to sell to himself under the power of sale in the mortgage deed of trust to him, he (3) can not surmount the third hurdle, namely that he did not proceed according to the terms of the mortgage which he exacted from the mortgagors as found in his mortgage deed of trust.

The applicable part of the respondent's mortgage deed of trust from the petitioners reads as follows:

> ". . . But should the said J. S. Garlington and wife, Jennie L. Garlington, parties of the first part, make default in the punctual payment of said indebtedness, or any part thereof, principal or interest, as the same shall become due and payable, or should said parties of the first part in any respect fail to keep and perform any one or more of the conditions herein provided to be kept and performed by said parties of the first part, then, and in any such case, the whole amount of said indebtedness remaining unpaid shall,

at the option of the party of the third part, or other holder thereof, immediately mature and become payable, and it shall thereupon, or at any time thereafter, the same or any part thereof remaining unpaid, be the duty of the said party of the second part herein, and of his successor substitute, as hereinafter provided, on the request of the said party of the third part, or other holder thereof (which request is hereby presumed) to enforce this Trust; and **after advertising the time, place and terms of the sale of all the above conveyed and described property for at least twenty days successively next before the day of sale, exclusive of the day of posting and the day of sale, by posting up written or printed notices thereof . . .**" From the mortgage deed of trust, R. 50 to 51.

That is, the advertisement must be made continuously for twenty-one days immediately preceding the day of sale.

The day of sale was set for January 2, 1940:

"Notice is hereby Given That on Tuesday, the **2nd day of January, 1940**, between ten o'clock A. M. and four o'clock P. M., I will sell said real Estate . . ." From the notice of sale, R. 57.

This notice of sale was dated December 6, 1939, the very day the order of the bankruptcy court was entered:

"Witness My Hand this 6th day of December, 1939." From the notice of sale, R. 57.

The sale was held on January 2, 1940, as noticed. On that date too the deed was executed and recorded. R. 54 to 56. Date of deed: R. 56, top of page. Date of Record: R. 56, bottom of page.

Now the authority by which the respondent as mortgage holder under his mortgage deed of trust presumed to conduct this sale through his trustee was dated December 4, 1939, and filed December 6, 1939. R. 58 to 61. (The file

date of December 6, 1940, in the record at the top of R. 61 is obviously a misprint for 1939. If 1940 is the actual filing date, it is all the worse for the respondent. We take 1939 as the correct date.)

No order of a United States District Court is effective until after ten days have elapsed after its entry:

> "Except as stated herein, no execution shall issue upon a judgment **nor shall proceedings be taken for its enforcement** until the expiration of 10 days after its entry." Rules of Civil Procedure, Rule 62 (a).

There is no exception which is applicable to the order of December 6, 1939. The word "judgment" is defined in Rule 54 (a) as follows:

> " 'Judgment' as used in these rules includes a decree and any order from which an appeal lies." Rules of Civil Procedure, Rule 54 (a).

Therefore no lawful advertisement of sale could be made before December 16, 1939, as the twenty-one days required in the mortgage deed of trust for advertisement immediately preceding the sale expired on January 6, 1940, it is obvious that the trustee's deed in foreclosure which was executed and recorded on January 2, 1940, could not be valid. If a deed in foreclosure could be valid when the required preliminary advertisement was made while there was no power to make it, then a mortgage holder may advertise at any time and "can" his advertisement for future use when it suits his convenience!

Amendments V and XIV to the Constitution prohibit both the United States District Court and the state courts from taking from the petitioners their property without due process of law. Both the federal court and the state courts by their respective judgments would, if permitted

by this court, so deprive the petitioners of the 2560 acres contrary to due process of law.

So the respondent's title is void for want of foreclosure. He is still a mortgagee under the original mortgage deed of trust. Title is still in the farmer debtors, subject to the mortgage lien.

It is therefore an inescapable conclusion that the deed which the respondent obtained and recorded is void.

CONCLUSION.

The plain intent of Section 75 has been circumvented and a great injustice has been done to the petitioner. There is no intervening party and no right has vested. The respondent has deliberately thwarted the Federal statute. This he has confessed at page 8 of his motion to dismiss where he says, "respondent, A. L. Wasson, admits that there was an irregularity in the procedure of the Federal District Court."

As the judgment of the state court which is brought before the court can not possibly be a valid order, this court should review it so that the Constitution of the United States and the laws made in pursuance thereof may not be violated by the state courts.

Respectfully submitted,

Lima, Ohio
February 6, 1943.

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